

SERVICE DATE – JUNE 2, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-563 (Sub-No. 1X)

KANSAS EASTERN RAILROAD, INC.—ABANDONMENT EXEMPTION—
IN BUTLER AND GREENWOOD COUNTIES, KS

Decided: June 1, 2006

Kansas Eastern Railroad, Inc. (KER), filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments for KER to abandon a 44.5-mile line of railroad between milepost 438.5, at Severy, and milepost 483.0, near Augusta, in Butler and Greenwood Counties, KS. Notice of the exemption was served and published in the Federal Register on August 25, 1999 (64 FR 46471).¹ On December 10, 1999, the Board reopened the proceeding to issue a decision and notice of interim trail use or abandonment (NITU) under 49 CFR 1152.29 and the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). The NITU provided a 180-day period for KER to negotiate an agreement with Butler County (County) for interim trail use/rail banking on the portions of the right-of-way between milepost 438.5 and milepost 476.4, and between milepost 476.65 and milepost 483.0.² Subsequently, by decision served on July 5, 2000, the proceeding was reopened to substitute American Trails Association, Inc. (ATA), as the trail sponsor. By letter filed on July 7, 2000, KER and ATA notified the Board that they had entered into an agreement for interim trail use. On September 14, 2001, ATA filed a notice of intent to terminate interim trail use for the portions of the right-of-way between milepost 471.0, near Leon, and milepost 476.4, and between milepost 476.65 and milepost 483.0, near Augusta, a distance of 11.75 miles, in Butler County, KS. By decision served on October 25, 2001, the proceeding was reopened and the NITU was vacated with respect to those portions of the right-of-way.³ On December 18, 2001, the County filed a request for the issuance of a NITU for the same portions of the right-of-way (between milepost 471.0 and milepost 476.4 and between

¹ By decision served on September 23, 1999, the exemption was made subject to environmental conditions and a historic preservation condition.

² By letter filed on May 2, 2000, KER notified the Board that it had exercised its authority to abandon the portion of the right-of-way between milepost 476.4 and milepost 476.65 and that it had entered into an agreement with the State of Kansas for the sale of that line segment, which was needed by the State for the reconstruction of a highway.

³ The October 25, 2001 decision noted that the line segment between milepost 438.5 and milepost 471.0 remained subject to interim trail use/rail banking.

milepost 476.65 and milepost 483.0). By decision served on January 17, 2002, the requested NITU was issued. On July 13, 2004, ATA filed a notice of intent to terminate interim trail use for the portion of the right-of-way between milepost 438.5 and milepost 471.0, near Leon. By decision served on July 30, 2004, the proceeding was reopened and the NITU was vacated with respect to that portion of the right-of-way.

On September 7, 2004, the County filed a request for issuance of a NITU for the same portion of the right-of-way (between milepost 438.5 and milepost 471.0). The County submitted a statement of willingness to assume full responsibility for management of, for any legal liability arising out of the transfer or use of the property (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way, as required by 49 CFR 1152.29. The County acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. KER indicated a willingness to negotiate with the County.

On September 22, 2004, David L. Murfin, an adjacent landowner, filed a petition to intervene, arguing that the County's NITU request should be denied, and seeking to conduct limited discovery on Butler County.⁴ The County filed a reply to Mr. Murfin's petition on October 12, 2004.

By letter filed on August 8, 2005, the County and KER jointly seek to limit the most recent NITU request to include only that portion of the right-of-way located between milepost 457.9, at the Butler-Greenwood County border, near Beaumont, and milepost 471.0, near Leon.

DISCUSSION AND CONCLUSIONS

Mr. Murfin claims that the County's NITU request is a sham because the County has no intention of operating a trail on the line but rather intends to use the property for utility use and provide long-term leases to adjacent landowners for their own use. Mr. Murfin also contends that the County's request should be denied because it was late-filed.

In its reply, the County contends that its plans are consistent with Congress' intent in the Trails Act to preserve rights-of-way for future reactivation of rail service (rail banking) and allow the property to be used in the interim as a trail. The County explains that it currently does not have available funding to construct a fully developed trail along the entire right-of-way and that, accordingly, it is exploring the option of leasing segments of the rail corridor to adjacent landowners on an interim basis for agricultural use until such time as funding becomes available

⁴ Mr. Murfin's petition to intervene will be granted, as Mr. Murfin has a demonstrated interest in the proceeding and his intervention will not unduly broaden the issues.

to develop a trail or the corridor is again needed for rail service. In support, it includes a copy of a lease agreement it proposes to offer landowners, which includes these terms. The County also contends that its plan to permit utility use on the right-of-way in the future is not inconsistent with interim trail use or with the restoration of active rail service on the line.

Finally, the County asserts that its NITU request is timely, because ATA had previously rail banked the portion of the right-of-way at issue, and the record here does not show that the railroad took action to consummate the abandonment of the instant property (after the prior NITU was vacated). Moreover, the County notes that the Board's policy is to accept late-filed trail use requests.

Mr. Murfin has not demonstrated that the County's NITU request should be denied or that discovery is warranted. First, Mr. Murfin's reasons for opposing the issuance of a NITU are inconsistent with the Board's limited role under the Trails Act. As the Board has repeatedly pointed out, its authority under the Trails Act is ministerial. The Trails Act does not grant the Board discretionary authority to disapprove a voluntary trail use agreement that meets the stated requirements of 16 U.S.C. 1247(d) and the Board's rules at 49 CFR 1152.29. Iowa Southern R. Co.—Exemption—Abandonment, 5 I.C.C.2d 496, 503 (1989), aff'd sub nom. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990) (Goos); Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144 (D.C. Cir. 2001). Here, the County, by filing the required statement of willingness, has consented to assume responsibility for managing the right-of-way and for legal liability and for payment of taxes for the period of any interim trail use. The County has also agreed to comply with the statutory rail banking condition in section 1247(d). And KER has agreed to the request for a NITU to permit Trails Act negotiations for the specific portions of the right-of-way discussed above. See Goos, 911 F.2d at 1295-96. Moreover, the Board does not decide whether interim trail use is desirable for a particular line. Nor does the Board have any involvement in the type or level of the trail that is used for a particular right-of-way. See Norfolk and Western R.R.—Aband. Exemp.—Between Kokomo and Rochester in Howard, Miami, and Fulton Counties, IN, STB Docket No. AB-290 (Sub-No. 168X) (STB served May 4, 2005) (Kokomo); Central Kansas Railway, Limited Liability Company—Abandonment Exemption—In Marion and McPherson Counties, KS, STB Docket No. AB-406 (Sub-No. 6X) (STB served May 8, 2001); Idaho Northern et al.—Abandonment & Discon. Exemption, 3 S.T.B. 50 (1998) (Idaho Northern).

Second, the Board has previously allowed dual uses of trails. See CSX Transportation, Inc.—Abandonment Exemption—In Monroe and Owen Counties, IN, STB Docket No. AB-55 (Sub-No. 514X) (STB served Sept. 30, 1997) (trail and road allowed); see also KCT Railway Corporation—Abandonment Exemption—In Franklin, Anderson, and Allen Counties, KS, Docket No. AB-335 (Sub-No. 2X) (ICC served Oct. 30, 1992) (trail and light rail mass transit corridor allowed). Here, the plans for the dual use of the right-of-way as both a trail and a utility corridor, and the use of the right-of-way for agricultural purposes, are not inconsistent with the Trails Act because the County has explained that the utility corridor will not interfere with any trail use and future rail use. The agricultural use is only temporary and will cease when trail use is developed or all or part of the property is needed for active rail service.

Furthermore, there is no time limit on how quickly a trail must be developed to its intended level of use. See Idaho Northern, 3 S.T.B.2d at 59. Trail sponsors have been allowed to continue trail use negotiations when they did not have funds immediately available to develop a trail for advanced recreational uses. See, e.g., Missouri Pac. R. Co.—Abandonment In Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Atoka, and Bryan Counties, OK, ICC Docket No. AB-3 (Sub-No. 63) (ICC served Jan. 4, 1991). If the County's funding impediments only affect the level of trail to be developed (rather than its ability to assume responsibility for the right-of-way) or the time it will require to fully develop the trail for advanced recreational uses, it would be inappropriate to deny a NITU request. To do so would be inconsistent with both the Board's limited role under the Trails Act and Congress' intent to preserve as many rail corridors as possible under section 1247(d).

Regarding the timeliness of the request for a NITU, when it revised its abandonment regulations, in Aband. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of generally accepting Trails Act filings after the due date when it retains jurisdiction to do so. It is well settled that abandonment authority issued by the Board is permissive; to exercise that authority and consummate the abandonment requires some further action by the railroad manifesting a clear intent to abandon in order for the property to be removed from the Board's jurisdiction. See Birt v. STB, 90 F.3d 580, 590 (D.C. Cir. 1996); Kokomo. Moreover, a railroad's continued participation in trail use negotiations suggests that its intent is not to fully abandon the line but, rather, to retain the right-of-way in the national rail transportation system while permitting interim trail use. See Birt, 90 F.3d at 587; Kokomo. Here, the record shows that KER's consistent intent since this proceeding began has been for this line to be rail banked. KER has consented to every trail use negotiation request and the railroad never indicated that it intended to consummate the abandonment of the portion of the right-of-way at issue in this NITU request. Accordingly, the Board has retained jurisdiction over the property. Because the County has made the filings required by the statute and our Trails Act rules, and because KER has agreed to negotiate, a NITU will be imposed. Id.

Finally, Mr. Murfin's petition for permission to conduct limited discovery on County will be denied because discovery would be inconsistent with the Board's limited, ministerial role under the Trails Act.

Under the NITU that will be imposed, the parties may negotiate a Trails Act agreement during the 180-day period described below. If the parties reach a mutually acceptable Trails Act agreement, no further Board action is necessary. If no agreement is reached within 180 days, KER may fully abandon the line, provided the conditions imposed in the September 23, 1999 decision are met.⁵ See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is

⁵ Those conditions are that KER: (1) consult with the National Geodetic Survey (NGS) and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station (Continuation)

subject to restoration for railroad purposes. See 49 CFR 1152.29(d)(2).

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Mr. Murfin's petition to intervene is granted.
3. Mr. Murfin's petition for denial of the County's trail use request is denied.
4. Mr. Murfin's petition for permission to conduct limited discovery on Butler County is denied.
5. Upon reconsideration, the notice of exemption served and published in the Federal Register on August 25, 1999, exempting the abandonment of the line described above is reopened to the extent necessary to issue a NITU permitting interim trail use/rail banking negotiations as set forth below, for the portion of the line extending between milepost 457.9 and milepost 471.0, for a period of 180 days from the service date of this decision and notice (until [180 days from service date]).
6. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.
7. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.
8. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

markers; (2) consult with the Kansas Department of Health and Environment in Topeka to determine if a permit is required under section 402 of the Clean Water Act, 33 U.S.C. 1342; and (3) retain its interest in and take no steps to alter the historic integrity of the Beaumont St. Louis and San Francisco Railroad Water Tank until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

9. If an agreement for interim trail use/rail banking is reached by [180 days from service date], interim trail use may be implemented. If no agreement is reached by that time, KER may fully abandon the line, subject to the conditions imposed in the decision served on September 23, 1999. See 49 CFR 1152.29(d)(1).

10. This decision and notice is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary